



REPUBLIC OF KENYA



KENYA LAW
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Muli & 2 others v Shichende & another (Environment and Land Appeal E019 of 2025) [2025] KEELC 7164 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7164 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E019 OF 2025
LC KOMINGOI, J
OCTOBER 16, 2025

BETWEEN

JONATHAN MUNYWOKI MULI 1ST APPELLANT
MUENDO MUASA UVYU 2ND APPELLANT
GIDEON WAMBUA KYENGO 3RD APPELLANT

AND

JOSPHAT ENDEGE SHICHENDE 1ST RESPONDENT
ROSY NASABA WAFULA 2ND RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion application dated 10th April 2025 brought under Order 22 (1)(2) and (3), Order 42 Rule 6(1)(2) of the Civil Procedure Rules and Section 1A, 1B and 3A of the [Civil Procedure Act](#). It seeks:
 - i. Spent.
 - ii. Spent.
 - iii. There be a stay of ex parte judgement in Ngong MCELC No. E005 of 2021 entered on 15th February 2024 and all consequential orders pending the hearing and determination of this Appeal.
 - iv. The ex parte judgement entered on 15th February 2024 and all consequential orders be set aside.
 - v. The Applicants be granted leave to defend the suit in Ngong MCELC No. E005 of 2021.
 - vi. That costs be provided for.



2. The grounds are on the face of the application as set out in paragraphs a to h. It is supported by the sworn Affidavit of Jonathan Munywoki Muli, the 1st Appellant.
3. He avers that the lower Court suit Ngong MCELC No. E005 of 2021 was filed and judgement delivered without their knowledge. They were never served with summons to enter appearance and only learnt of the judgement dated 26th April 2024 on 4th May 2024 when he received an email from one, Robert Kinyanjui for Notice of Entry of Judgement. Upon perusal of the Court file, they found that the Respondents herein, filed the suit against them on grounds that they had trespassed against and fenced off a portion of the Respondents' parcel LR No. Kajiado/Olchoro – Onyore/6106 and were obstructing the access road to LR No. Kajaido/Olchoro-Onyore/6793. They therefore sought injunctive reliefs against the Applicants for parcels Kajiado/Olchoro – Onyore/6106 and Kajiado/Olchoro-Onyore/6793. Following the ex parte judgement dated 15th February 2024, the Respondents obtained a Decree dated 22nd April 2024.
4. The Appellants then filed an Application at the Lower Court dated 24th June 2024, which was dismissed vide a Ruling delivered on 3rd April 2025 which is the subject of this Appeal. They claim that if the Decree is executed, they stand to suffer irreparable loss and damage, adding that the rectification of boundaries of LR No. Kajiado/Olchoro-Onyore/6106 and restoration of access road for LR No. Kajiado/Olchoro-Onyore/6793 will interfere with proprietary rights of LR No. Kajiado/Olchoro-Onyore/11211- Real Options Investment Company Limited who are not parties to the suit.
5. They urged the court to allow the Application.
6. The Respondents in their Replying Affidavit dated 30th May 2025 contested the application on the grounds that the prayer for stay of execution of judgement was untenable because there was no Appeal before this Court against the Judgement and Decree of 15th February 2024. And that what the Appellants had appealed against was the Ruling dated 3rd April 2025 which dismissed their application.
7. They deponed that the Applicants were duly served with summons to enter appearance by substituted service through newspaper advertisement on 5/2/2021 but neglected to enter appearance or defend the same and instead, opted to lodge a suit in this Court in ELC No. E013/2023 on the same subject matter against the Respondents. It is their case that the ruling and order were lawful and regular and ought to be upheld. They urged this court to dismiss the Application with costs.
8. The Applicants filed a Supplementary Affidavit stating that the Court has powers to set aside exparte judgment entered by the Learned Trial Magistrate on 15th February 2024 in Ngong MCELC No. E005 of 2021 and also grant leave to the Applicants to defend the suit. They added that they have demonstrated sufficient cause for stay of execution and that that there could be no Appeal against the judgment in Ngong MCELC No. E005 of 2021 without first applying to set aside the said judgment which was obtained exparte and unlawfully without service of summons.
9. On the 10th June 2025, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

Submissions of the Applicants

10. Counsel submitted that the Appellants had satisfied conditions of Order 42 Rule 6(2) of the Civil Procedure Rules for grant of stay of execution because they would suffer substantial loss and that the Court had discretion to grant the order as held in *Ena Investment Limited v Benard Ochau Mose & 2 others* [2022] eKLR. It was also submitted that an application for stay of execution was to preserve the subject matter citing *RWW vs EKW* [2019] eKLR.



11. Other authorities used to support their application were *Matata & another v Rono & another* [2024] KEHC 2799 (KLR), *Butt vs Rent Restriction Tribunal* [1979], *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 and *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR.

Submissions of the Respondents

12. On whether the impugned Order is capable of being stayed, it was submitted that the lower court order being a negative order could not be stayed citing *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR.
13. On whether the stay of execution should be issued, it was submitted that there was no evidence of substantial loss, irreparable harm or prejudice that would be suffered by the Applicants, if stay of execution is not granted. Counsel added that the orders sought were definitive in nature and could not be granted at an interlocutory stage. As such the application should be dismissed with costs to the Respondent.

Analysis and determination

14. I have considered the Notice of Motion, the affidavit in support, the response thereto, the written submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether the Application has met the threshold for grant of stay of execution pending Appeal..
 - ii. Who should bear costs of the Application?
15. The Appellants seek stay of execution the exparte judgement dated 15th February 2024 on the grounds that they were not served with summons. They also claim they have a strong defence and stand to suffer loss and prejudice if the stay is not granted. The Respondents contested this claim stating that the Appellants were served by substituted service but the Appellants chose not to enter appearance or file any response.
16. The principles guiding the grant of a stay of execution pending appeal are settled. Order 42 rule 6(2) of the Civil Procedure Rules provides that;

“No order for stay of execution shall be made under subrule (1) unless—

 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
17. Further, the Court of Appeal in *Butt v Rent Restriction Tribunal*[1979] eKLR held that it was in the Court’s discretion to determine whether or not to issue stay orders; It was stated thus;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful from being nugatory...”



18. From the Court's record, I take cognisance of a ruling dated 3rd April 2025, in MCELC E005 of 2021. A reading of the Ruling shows that the Appellants filed an application at the lower court seeking stay of execution and setting aside of ex parte judgement dated 15th February 2024. These are the same prayers being sought by the Appellants in this Application.
19. I have considered that the issue is a boundary issue dispute. The Appellants herein have been said to have encroached the Respondent's parcel.
20. I am satisfied that the Appellants have demonstrated that the Appeal herein will be rendered nugatory if these orders are granted.
21. I find merit in the application and I grant the orders sought in the following terms;
 - a. There be a stay of ex parte judgement in Ngong MCELC No. E005 of 2021 entered on 15th February 2024 and all consequential orders pending the hearing and determination of this Appeal.
 - b. That the Appellants do deposit Kshs.100,000/= as security for costs in court within 45 days from the date of this ruling. In Default the stay orders shall automatically lapse.
 - c. That costs do abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF OCTOBER 2025.

L. KOMINGOI

JUDGE.

In The Presence Of

Mr. Uvyu for the Appellants.

Mr. Vincent Olala for Mr. Litoro for the Respondents.

Court Assistant – Peter.

